IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION	§ § §	MDL 1446
This Document Relates To:	§	
MARK NEWBY, et al., Plaintiffs,	§ § §	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
v.	§	
ENRON CORPORATION, et al., Defendants	§ §	
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ENRON CORPORATION, Plaintiffs,	§ § §	CIVIL ACTION NO. H-04-0091 (COORDINATED CASE)
v.	§	
ANDREW S. FASTOW, et al., Defendants.	§ §	
PAMELA M. TITTLE, et al., Plaintiffs,	§ § §	CIVIL ACTION NO. H-01-3913 AND CONSOLIDATED CASES
v.	§	
ENRON CORPORATION, et al., Defendants.	§ §	

DEFENDANT KENNETH L. LAY'S MEMORANDUM CONCERNING DISCOVERY OF EXAMINER TRANSCRIPTS

1925

TO THE HONORABLE MELINDA HARMON,
UNITED STATES DISTRICT JUDGE:

Defendant Kenneth L. Lay ("Defendant" or "Lay") endorses and joins in the Outside Directors' Memorandum Concerning Discovery of Examiner Transcripts, urging that this Court authorize all parties to have access to the transcripts of Rule 2004 examinations and other sworn statements provided to and assembled by the Enron Corporation Bankruptcy Examiner, Neal Batson, in the course of his investigation (the "Examiner Transcripts"). Lay submits this brief memorandum separately, however, to add the unique perspective of one who is a defendant in a lawsuit filed by the Official Committee of Unsecured Creditors of Enron Corp. ("Creditors' Committee") – a party that already possesses virtually all of the disputed material, and has used (and will continue to use) that material in prosecuting its case against Lay and the other defendants to its lawsuit. Lay and those other defendants labor right now at an actual, concrete, clear and present disadvantage in that lawsuit, and they will continue to do so unless they are given the same access to the Examiner Transcripts as their opponent, the Creditors' Committee. Fundamental fairness and basic principles of civil procedure require that, in such a circumstance, they be granted that right and access. Counsel for the Creditors' Committee has acknowledged that and has stated that the Committee is willing to produce copies of the Examiner Transcripts in its possession to those, like Lay, whom the Committee has sued. This Court, therefore, should authorize the access to and disclosure of the Examiner Transcripts that fairness and the Rules require, and that the Creditors' Committee does not oppose. In further support and explanation, Defendant Lay states as follows:

The Creditors' Committee Lawsuit

In October 2002, the Creditors' Committee commenced an action in state court in Montgomery County, Texas, against certain former Enron officers and employees — including Defendant Lay — urging various claims of fraud, breach of fiduciary duty, breach of the duty of care, and the like. *Official Committee of Unsecured Creditors of Enron Corp. v. Fastow, et. al.*, No. 02-10-06531-CV (9th Judicial District Court, Montgomery County, Texas) ("Creditors' Committee Lawsuit"). In December 2003, the Creditors' Committee expanded that lawsuit to add several new claims and several new defendants. *See* Plaintiff's First Amended Petition, *Official Committee of Unsecured Creditors' of Enron Corp. v. Fastow* (copy attached as Exh. A). Although the specific causes of action in that Lawsuit do not track those in *Newby* and *Tittle*, the Committee's Amended Petition focuses on most of the same events and transactions as the cases brought in this Court. *See Id.* ¶¶ 32-173.

The Creditors' Committee Lawsuit was removed from state district court to federal court in Houston on January 9, 2004, by Defendant Jeffrey McMahon (who was added to the Lawsuit in the Creditors' Committee's Amended Petition in December, 2003). On January 22, 2004, this Court ordered that the Creditors' Committee Lawsuit be designated as a "coordinated case" in conjunction with *Newby*, and that it "proceed under the schedule in *Newby*." Order of Coordination, January 22, 2004 (attached as Exh. B). Both before and after the Court issued that Order, the Creditors' Committee participated in formulating the proposed *Newby/Tittle* Deposition Protocol, with the anticipation of participating in discovery pursuant to that Protocol (subject to the Committee's motion for remand to state court). (*See* Letter of January 28, 2004, to this Court from the "Drafting Committee" of the Deposition Protocol, which includes counsel

for the Creditors' Committee, ***and*** [Proposed Revised] Deposition Protocol Order at pp. 1, 2 (listing the Creditors' Committee Lawsuit as an action to be governed by the Protocol, and the Creditors' Committee as a "part[y] subject to the Deposition Protocol") (attached, collectively, as Exh. C).

The Creditors' Committee's Access to and Use of the Examiner Transcripts

There is no dispute that the Creditors' Committee has had, and continues to have, access to and physical possession of copies of the Examiner Transcripts, as well as other documents that were provided to and assembled by the Bankruptcy Examiner. The Examiner explained to the Bankruptcy Court that "the Debtors and the Creditors' Committee have access to virtually all of the information obtained by the Enron Corp. Examiner in the course of the Enron Corp. Examination . . . ." Motion of Neal Batson, the Enron Corp. Examiner, with Respect to Certain Procedural Issues ¶ 12 (attached as Exh. F to Outside Directors' Memorandum); *id.* ¶ 24 (noting that the "Evidence Binders" for all four Examiner Reports have been, or will be, delivered to Enron and presumably to the Creditors' Committee, as well); *see also* Responsive Memorandum of Neal Batson, the Enron Corp. Examiner ¶ 13 ("The Debtors have access, for all practical purposes, to all of the documents and information to which the Enron Corp. Examiner has had access.") (copy attached as Exh. D).[1] The Creditors' Committee, itself, has acknowledged in filings to the Bankruptcy Court that it has received and reviewed the "oral sworn statements" compiled by the Examiner in his investigation. Emergency

[1] Just as the Creditors' Committee is a party to its Montgomery County Lawsuit, Enron (the "Debtor") is a party to *Tittle* and to "the Enron Adversary Action," *Enron Corp. v. Citigroup Inc., et al.*, Adv. Pro. No. 03-09266(AJG)(Bankr. S.D.N.Y.), and it therefore can use and rely on the Examiner Transcripts in those cases.

Motion of Official Committee of Unsecured Creditors for Authorization to Commence Litigation ¶¶ 3, 4, 16, 25 (copy attached as Exh. E). Indeed, counsel for the Creditors' Committee has confirmed directly to Lay's counsel that the Committee received and continues to hold copies of those materials.

Similarly, there is no dispute that the Creditors' Committee has used and relied on the Examiner Transcripts and other materials assembled by or provided to the Examiner to formulate the Committee's pleadings in its Lawsuit. In its application for authorization to proceed with and expand its Lawsuit in Montgomery County, Texas, the Creditors' Committee recently acknowledged that it had reviewed and relied upon "well in excess of 100 oral sworn statements" and "millions of pages of documents" assembled by the Examiner. *See* Emergency Motion of Official Committee of Unsecured Creditors ¶ 16 (Exh. E). In the hearing before the Bankruptcy Court on the Financial Institutions' motion for a protective order regarding the Examiner Transcripts, counsel for the Creditors' Committee appeared and expressly noted that it was taking no active position on the motion because "the Financial Institutions . . . are not seeking any relief as to the Committee's ability to use the sworn statements" — clearly signaling the Committee's intent to continue using those statements and to safeguard its right to do so. Transcript of Hearing held December 4, 2003, at pp. 33, 34 (copy attached as Exh. B to Outside Directors' Memorandum).[2] So, there can be no doubt that the Creditors' Committee will

[2] Mr. Marks, counsel for the Debtor Enron Corp. — Plaintiff in the Enron Adversary Action — also appeared and similarly observed that "the Debtors' position is essentially the same as what you just heard from the Creditors' Committee. The pending motion does not seek any relief against the Debtors or any attempt to restrict the Debtors' use of these statements." *Id.* at 34. Significantly, counsel for the Financial Institutions who sought protection from the Bankruptcy Court, and who opposed Lead Plaintiffs' Motion to Compel in this Court, said nothing in response to these assertions by the Creditors' Committee and the Debtor; nor did they make any argument to the Bankruptcy Court that the Debtor and the Committee would

continue to use and rely on the Examiner Transcripts to prepare discovery, to plot strategy, and otherwise to pursue its Lawsuit against Lay and the other defendants.

Principles of Fundamental Fairness and Basic Civil Procedure Require that Defendants, Like Lay, Be Given Access to the Examiner Transcripts Reviewed and Used by the Plaintiff Creditors' Committee.

Given the Creditors' Committee's possession and past and likely future use of the Examiner Transcripts, fundamental fairness and basic principles of civil procedure require that those materials be provided to the Committee's opponents in the lawsuit that it filed, predicated in part upon the Examiner materials. As the United States Supreme Court has observed in one of the seminal cases addressing pre-trial discovery, "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disclose whatever facts he has in his possession." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). This fundamental principle applies to statements gathered from potential witnesses, and materials such as the Examiner Transcripts that, although generated or prepared by a third party or even in a separate governmental process, are now in the possession of one's opponent in litigation. *See, e.g., In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995) (requiring defendant banking institution to produce materials in its possession generated by federal bank regulatory agencies in examination related to the issues in the pending civil lawsuit); *In re Initial Public Offering Sec. Lit.*, ____ F. Supp. 3d ___, 2004 WL 60290 (S.D.N.Y. Jan. 12, 2004) (compelling production in private securities litigation of "Wells

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not be free to use the Examiner Transcripts as they deemed appropriate in pursuing civil litigation, such as the Creditors' Committee Lawsuit and the Enron Adversary Proceeding.

submissions" previously provided by defendants to the SEC in connection with its enforcement investigation of the same matters that form the basis of the civil lawsuit); *Cumis Ins. Society, Inc. v. South-Coast Bank*, 610 F. Supp. 193 (N.D. Ind. 1985) (compelling United States Attorney to produce FBI investigative file, including statements, then in the "possession" of the U.S. Attorney and relevant to the pending civil litigation); *see also In re Legato Systems, Inc. Sec. Lit.*, 204 F.R.D. 167 (N.D. Cal. 2001) (requiring defendant to procure from the SEC a copy of the deposition that he had previously provided to it, and to produce it to plaintiffs in the civil litigation).[3]

The mutual access to the Examiner Transcripts impelled by the Rules and by principles of fundamental fairness is underscored in this case by the apparent support of both the Examiner and the Creditors' Committee. In filings before the Bankruptcy Court, the Enron Corp. Examiner repeatedly suggested that discovery of materials compiled in his investigation, including transcripts and sworn statements, be sought from "the Debtors, the Creditors' Committee, or most appropriately, the producing parties." Supplemental Brief in Support of the Motion of Neal Batson, the Enron Corp. Examiner, Regarding Certain Procedural Issues at p. 6, n.5 (copy attached as Exh. F); *see also* Responsive Memorandum of Neal Batson, the Enron Corp. Examiner ¶ 13 (Exh. D) ("discovery efforts should be directed at the Debtors, the Creditors' Committee or at

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[3] The Creditors' Committee has filed a motion asking that this Court remand its Lawsuit to state district court. Lay consented to the removal, and urges that the remand motion be denied and that the case proceed in this federal court, in coordination with *Newby*. But, even if the case were remanded to state court, the Texas Rules of Civil Procedure would explicitly require that Lay and the other defendants to the Creditors' Committee Lawsuit be given access to the Examiner Transcripts in that forum, as well. *See* TEX. R. CIV. P. 192.3(h)("A party may obtain discovery of the statement of any person with knowledge of relevant facts — a 'witness statement' — regardless of when the statement was made."). *See also* TEX. R. CIV. P. 192.3(b), 192.7(b)("A person is required to produce a document . . . that is within the person's possession, custody or control.").

those parties who have produced documents").[4] Similarly, Counsel for the Creditors' Committee – with whom Lay's counsel has conferred directly – has agreed that defendants to the Creditors' Committee Lawsuit, such as Lay, are entitled to the Examiner Transcripts and other materials that the Creditors' Committee has received from the Examiner, and that the Creditors' Committee will not oppose production of those materials to those defendants.

To paraphrase what another federal district judge has observed in somewhat similar circumstances:

> It would not advance but defeat the purpose of the Rules to require [a party] in this case to proceed laboriously, and possibly at the cost of several years' delay, to duplicate the document selection process [and the process of obtaining sworn statements] conducted by [parties to a prior, related proceeding, such as the investigation conducted by the Enron Corp. Examiner], when the fruits of that process are readily available and in the possession of a party to this very litigation, and when those who conducted the search do not object [just as the Creditors' Committee does not object here].

United States v. AT&T Co., 461 F. Supp. 1314, 1339 (D.D.C. 1978).[5]

Use of the Examiner Transcripts Beyond the Creditors' Committee Case

Once the Examiner Transcripts are produced to the defendants in the Creditors' Committee Lawsuit (or to those in other cases brought, or to be brought, by Enron or the Creditors' Committee), it is both illogical and impracticable to limit or prohibit use of

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[4] Like the Outside Directors, Lay does not propose to seek discovery of the Examiner Transcripts directly from the Enron Corp. Examiner. Therefore, the institutional and policy concerns regarding discovery from a bankruptcy examiner are not at play here.

[5] The Examiner Transcripts in question are not privileged and do not constitute the privileged "work product" of the Creditors' Committee. The Examiner has repeatedly stated that he "is an independent officer of the Court," and is "independent of both the Debtors and the Creditors' Committee." Responsive Memorandum of Neal Batson ¶¶ 10-12, 21 (Exh. D). Therefore, the "work product" of the Examiner is not privileged "work product" of the Committee; in fact, the Examiner has refused to share his protected "work product" with the Committee. *Id.*

those materials in other cases to which those same defendants are parties — *e.g.*, in *Newby* and the other "consolidated" and "coordinated" cases before this Court. The majority of the parties to the Creditors' Committee Lawsuit are parties to *Newby* and/or *Tittle* and other cases consolidated before the Court. And, although the specific causes of action in the Creditors' Committee Lawsuit vary somewhat from those in *Newby*, the factual background and the transactions upon which they focus are substantially the same. *See generally*, Plaintiff's First Amended Petition in Creditors' Committee Lawsuit ¶¶ 32-173 (Exh. A). Discovery in the Creditors' Committee Lawsuit is to proceed along with discovery in *Newby* and *Tittle*. *See* Order of Coordination (Exh. B); [Proposed Revised] Deposition Protocol Order at pp. 1, 2 (Exh. C). Are only a few parties — such as the Creditors' Committee — to be allowed the unfair advantage of access to obviously relevant materials like the Examiner Transcripts, while others participating in the same joint, coordinated discovery process are denied that right and information? As the Outside Directors have explained, the same principles of fundamental fairness discussed above require that, once any party to a lawsuit obtains the Examiner Transcripts, all other parties must be given access to those materials, as well.

CONCLUSION

For the reasons discussed above, Defendant Kenneth L. Lay respectfully urges this Court to allow him and all other defendants to the Creditors' Committee Lawsuit the same access to the Examiner Transcripts as is enjoyed by their opponent in that Lawsuit, the Creditors' Committee — particularly in light of the Committee's expressed willingness to disclose those materials to the defendants. Moreover, in light of the overlap and coordination of parties, claims, and procedures among *Newby*, *Tittle*, and the Creditors' Committee Lawsuit, Lay further urges that all parties to *Newby* and *Tittle* be

granted the same rights to review and use the Examiner Transcripts as the parties to the Creditors' Committee Lawsuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant Kenneth L. Lay's Memorandum Concerning Discovery of Examiner Transcripts was served on all counsel on this 5th day of February, 2004, by posting to www.esl3624.com.

Penelope Blackwell w/permission BGK

The Exhibit(s) May

Be Viewed in the

Office of the Clerk